EXHIBIT 13

AO 450 (Rev. 5/85) Judgment in a Civil Case ⊕

ENTERED ON DOCKET
DEC 23 1994
By Deputy

United States District Court

WESTERN DISTRICT OF WASHINGTON
AT TACOMA

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DEC 23 1994
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA
BY DEPUTY

CLYDE RAYMOND SPENCER,
Plaintiff,

v.

JOSEPH KLAUSER, ET AL,
Defendant.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C94-5238RJB

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ **Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

(1) The Report and Recommendation is adopted and approved;
(2) Respondent's Motion for Summary Judgment is GRANTED;
(3) Petitioner's Cross-Motion for Summary Judgment or Alternatively, for an Evidentiary Hearing is DENIED;
(4) The Petition is DENIED.

December 23, 1994

BRUCE RIFKIN
Clerk

Traci Najar

By Traci Najar, Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CLYDE RAYMOND SPENCER, Petitioner, v. JOSEPH KLAUSER, et al., Respondents.	CASE NO. C94-5238RJB ORDER ON SUMMARY JUDGMENT MOTIONS AND DENYING HABEAS PETITION

The Court, having reviewed the petition for habeas corpus, respondent's motion for summary judgment, petitioner's cross-motion for summary judgment, or, in the alternative, for an evidentiary hearing, the Report and Recommendation of the Hon. John L. Weinberg, United States Magistrate Judge, and the including the 10 May 1985 Plea Colloquy remaining record, does hereby find and Order:

(1) The Court adopts the Report and Recommendation;

(2) Respondent's Motion for Summary Judgment (docket 11) is GRANTED;

(3) Petitioner's Cross-Motion for Summary Judgment or Alternatively, for an Evidentiary Hearing (docket 14) is DENIED;

(4) The petition is DENIED;

AO 72
(Rev.8/82)

(5) The Clerk is directed to send copies of this Order to counsel of record and to the Hon. John L. Weinberg.

DATED this 23rd day of Dec, 1994.

Robert J. Bryan
United States District Judge

AO 72
(Rev.8/82)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CLYDE RAYMOND SPENCER, Petitioner, v. JOSEPH KLAUSER, et al., Respondents.	CASE NO. C94-5238RJB REPORT AND RECOMMENDATION

Petitioner seeks habeas relief under 28 U.S.C. § 2254. Petitioner is in the custody of the Washington Department of Corrections pursuant to his 1985 Clark County convictions by guilty plea for seven counts of Statutory Rape in the First Degree and four counts of Complicity to Statutory Rape in the First Degree. Petitioner was sentenced to two life terms plus a consecutive term of 171 months imprisonment.

Respondents move for summary judgment and petitioner cross-moves for summary judgment, or in the alternative, for an evidentiary hearing. For the reasons discussed below, I recommend the Court grant respondents' motion, deny petitioner's motion, and deny the petition.

GROUNDS FOR RELIEF

Petitioner presents the following grounds for habeas relief:

1. Conviction obtained by plea of guilty not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

2. Conviction obtained by plea of guilty which was unlawfully induced.

3. Conviction obtained by the unconstitutional failure of the prosecution to disclose evidence favorable to the defendant.

4. Conviction obtained through denial of effective assistance of counsel.

(Docket 1 at 5-6.)

Respondents acknowledge that petitioner presented these claims to the Supreme Court of Washington and has therefore exhausted his state court remedies as to these claims. (Docket 12 at 9.)

DISCUSSION

Involuntary Guilty Pleas

"The test for whether a defendant is competent to plead guilty is whether 'mental illness has substantially impaired his or her ability to make a reasoned choice among the alternatives presented and to understand the nature and consequences of the waiver.'" United States v. Lewis, 991 F.2d 524, 527 (9th Cir.) (quoting Chavez v. United States, 656 F.2d 512, 518 (9th Cir. 1981)), cert. denied, 114 S.Ct. 216 (1993). Due Process requires a state trial court to employ procedures designed to protect against the conviction of an incompetent. Hernandez v. Ylst, 930 F.2d 714, 716 (9th Cir. 1991). A competency hearing, however, is not

required absent a "substantial" or "bona fide" doubt of competency. Id.

> A good faith doubt about a defendant's competence arises if there is substantial evidence of incompetence. . . . There are no particular facts which invariably signal incompetence, but important factors which merit a judge's attention include: irrational behavior, demeanor before the trial court, and available medical evaluations.

Lewis, 991 F.2d at 527

The opinion of counsel as to a client's competency is not determinative, but "a defendant's counsel is in the best position to evaluate a client's comprehension of the proceedings." Hernandez, 930 F.2d at 718.

Petitioner entered Newton/Alford pleas, denying that he committed the offenses, and claiming he had no recollection of any event with which he was charged. (Docket 2 at 11.) He now claims that when he attended the plea change hearing, he was suffering from clinically-diagnosed major depression and was under the pharmacological effects of Xanex, Elavil and sodium amytal. (Id. at 9.) Petitioner claims the medications he took significantly interfered with his mental functioning at the time of his entry of the pleas, and that the psychiatric testimony at the plea hearing focused on his competency at the time of the crimes rather than at the time he entered his pleas.

Petitioner admits that "[t]hroughout the plea colloquy, there was no mention made to the trial judge of [petitioner's] psychiatric history including suicide attempts and hospitalization

for depression, his current diagnosis of major depression at the time of the plea, or the medication regimen that he was taking at the time of the plea." (Docket 2 at 25-26.)

At the plea hearing, the trial court carefully reviewed the plea agreement with petitioner and inquired into his understanding of its terms. (Docket 12, ex. 4 at 7-41.) The court specifically considered petitioner's competence to enter guilty pleas. When petitioner stated that he was pleading guilty without admitting guilt because he could not remember committing the crimes, and that testing had not revealed whether he was suppressing the memories, the court asked defense counsel if there was a defense based upon petitioner's capacity. (Id. at 19-20.) Counsel stated that petitioner was examined by two psychiatrists who both concluded "that [petitioner] has his full capacity about him." (Id. at 20.) The court asked petitioner if "any alcohol or drugs [were] involved or anything that might have affected your mental capacity." (Id.) Petitioner responded, "No, sir." (Id.) Petitioner agreed that based upon the doctors' evaluations and opinions, and upon counsel's advice, he believed he could present no legal defenses to the charges. (Id.)

The court asked petitioner if he felt that he was adequately represented by counsel and if he believed counsel made a maximum effort to explore both mental and factual defenses to the charges. (Id. at 35.) Petitioner said yes. (Id.) Petitioner indicated he had no questions about his representation, and he believed counsel

adequately, fairly, and on his behalf presented to him his options relative to pleading guilty versus going to trial. (Id. at 35-36.)

The court again inquired into petitioner's mental capacity. (Id. at 38-40.) The court asked counsel if petitioner was competent and able to assist counsel in his defense. (Id. at 39.) Counsel stated, "Yes, sir, he's cognizant of the charge against him and to the best of his recollection he's been able to assist me." (Id.) Petitioner, upon court inquiry, agreed with counsel's statement. (Id.) The court reviewed the qualifications of the two psychiatrists who examined petitioner, and the number of times they each met with petitioner, and concluded that petitioner's pleas were made freely and voluntarily, with a full and intelligent understanding of the potential consequences. (Id. at 39-41.)

The court's inquiry into petitioner's mental state, and review of the entire transcript of the plea hearing, indicate that the trial court had no evidence before it which should reasonably have caused it to doubt petitioner's competence. Petitioner does not claim otherwise. Rather, petitioner claims that federal habeas relief should be granted based upon information presented in this habeas action and to the trial court nearly one year after sentencing, in a motion to vacate petitioner's guilty plea.

Petitioner relies upon Steinsvik v. Vinzant, 640 F.2d 949 (9th Cir. 1981), and Boag v. Raines, 769 F.2d 1341 (9th Cir. 1985),

cert. denied, 474 U.S. 1085 (1986) for the habeas court's authority to consider evidence regarding competence even though the evidence was not presented to the trial court prior to sentencing. The Boag court stated:

> In a habeas proceeding, a petitioner is entitled to an evidentiary hearing on the issue of competency to stand trial if he presents sufficient facts to create a real and substantial doubt as to his competency, even if those facts were not presented to the trial court.

Id. at 1343. The court further noted:

> In cases finding sufficient evidence of incompetency, the petitioners have been able to show either extremely erratic and irrational behavior during the course of the trial, e.g., Tillery v. Eyman, 492 F.2d 1056, 1057-58 (9th Cir. 1974) (defendant screamed throughout the nights, laughed at the jury, made gestures at the bailiff, disrobed in the courtroom and butted his head through a glass window), or lengthy histories of acute psychosis and psychiatric treatment, e.g., Moore v. United States, 464 F.2d 663, 665 (9th Cir. 1972) (defendant repeatedly hospitalized for acute mental illness and hallucinations).

Id.

In support of his incompetency claim, petitioner submits his own declaration in which he states that the prescribed drugs did not appear to alleviate the feeling of desperation and depression which he felt throughout his confinement, and that these drugs "affected [his] ability to enter into a free and voluntary plea." (Docket 12, ex. 6F at 10.)

Petitioner also submits a letter from Dr. Lawrence Halpern, Ph.D., an Associate Professor in the Department of Pharmacology at the University of Washington School of Medicine. (Docket 2, ex. 28.) Dr. Halpern reviewed petitioner's medical records from The

Oregon Health Sciences University (id. at ex. 6), the Clark County Jail records indicating medications dispensed to petitioner (id. at ex. 16), declarations by petitioner and by his cell-mate, John Pearce (id. at exs. 1, 29), and letters from the two psychiatrists who examined petitioner (id. at exs. 10, 30). Dr. Halpern opines that the high dose and ineffectiveness of Sinequan prescribed for petitioner (as evidenced by the doctor's decision to switch to another anti-depressant, Elavil) indicates the severity of petitioner's depression. Dr. Halpern notes that the observations of declarants indicate that petitioner was confused, depressed, and non-communicative. (Id., ex. 28.) Dr. Halpern concludes that symptoms of petitioner's severe depression would have kept petitioner from intelligently participating in the preparation of his defense. (Id.) He adds numerous possible side effects of the prescribed anti-depressants, including confusion, sedation to the point of coma, hallucinations, and motor-retardation. (Id.)

Petitioner also claims that the sodium amytal he was given two days before his change of plea hearing has a half-life of 70 to 250 hours before it is eliminated from the body, and that it can potentiate the effects of the antidepressants he was also taking. (Docket 2 at 15-16.)

Assuming the truth of the evidence submitted by petitioner, as is required when considering the non-movant's evidence on a motion for summary judgment, petitioner demonstrates that he was taking medications which affected his mental state, and that he was

depressed, confused, and withdrawn. These responses, however, are not surprising or unusual given the fact that petitioner was charged with sixteen sex offenses involving his children, neither he nor counsel knew of any defense to the charges, and they believed a jury hearing the evidence would convict petitioner. Petitioner's demeanor and behavior did not cause the court or counsel to conclude that petitioner was not competent to make reasoned choices. Furthermore, the psychiatrists who examined petitioner gave no indication that petitioner was not competent to assist in his defense or to understand the charges against him and the import of his guilty pleas. The evidence does not show either that petitioner exhibited extremely erratic and irrational behavior during the plea hearing or sentencing hearing, or that he has a lengthy history of acute psychosis and psychiatric treatment.

I recommend, therefore, the Court find that no evidentiary hearing is required because petitioner fails to present sufficient facts to create a real and substantial doubt as to whether he was able to make a reasoned choice among the alternatives presented to him at the plea hearing, and to understand the nature and consequences of his guilty pleas. Accordingly, I recommend the Court grant respondent's motion for summary judgment as to petitioner's claim for habeas relief based upon his claim that his guilty pleas were not knowing and voluntary; and that the court

deny petitioner's cross-motion for summary judgment or for an evidentiary hearing on this issue.

Unlawfully Induced Guilty Pleas

"The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" Hill v. Lockhart, 474 U.S. 52, 56 (1985). In order to be valid, a guilty plea "cannot be the result of threats, misrepresentations, or improper promises." United States v. Anderson, 993 F.2d 1435, 1437 (9th Cir. 1993).

"In assessing the voluntariness of the plea, statements made by a criminal defendant contemporaneously with his plea should be accorded great weight. Blackledge, 431 U.S. at 73-74, 97 S.Ct. at 1628-29. Solemn declarations made in open court carry a strong presumption of verity." Chizen v. Hunter, 809 F.2d 560, 562 (9th Cir. 1986).

Petitioner claims that his guilty pleas were not voluntary because they were unlawfully induced by Sgt. Michael Davidson of the Clark County Sheriff's Office. Petitioner claims that after he was arrested and while he was being held in Clark County Jail and was represented by counsel, Sgt. Davidson repeatedly visited petitioner despite petitioner's objections, and finally was directed by jail staff to stay away from petitioner. Petitioner claims Sgt. Davidson repeatedly tried to convince him to confess and to plead guilty, emphasizing the traumatic effect a public

trial would have upon petitioner's children. Petitioner states it was later learned that Sgt. Davidson was romantically involved with petitioner's wife at the time of the investigation. (Docket 2 at 28.) Petitioner does not claim that Sgt. Davidson made any threats (predictions of the effects of trial on petitioner's children are not threats), misrepresentations, or improper promises.

Petitioner admits that the transcript of the plea hearing does not provide evidence of coercion. (Id.) At the hearing, the court asked petitioner if anyone made any threats or promises of any kind, except those discussed at the hearing. (Docket 12, ex. 4 at 16.) Petitioner said no. (Id.) Petitioner acknowledged at the hearing that he had no defense to the charges, that a jury hearing the evidence would convict him, and that he was entering the guilty pleas to eleven counts in exchange for the prosecution's agreement to drop five additional counts in the Second Amended Information. (Id. at 18-34.)

The Court of Appeals of Washington considered petitioner's claim that his pleas were coerced, and held: "Petitioner's own statements, the benefit of his plea agreement, and the lack of a defense outweigh petitioner's assertion that his plea was coerced." (Docket 2, ex. 26 at 3.)

I recommend the Court find that, assuming Sgt. Davidson's uninvited visits occurred as alleged by petitioner, the visits do not constitute unlawful coercion of petitioner's guilty pleas.

Accordingly, I recommend the Court grant respondent's motion for summary judgment as to petitioner's claim that his guilty pleas were coerced, and that the Court deny petitioner's cross-motion for summary judgment or for an evidentiary hearing.

Failure to Disclose Exculpatory Evidence

Petitioner claims the prosecution failed to disclose, in violation of Brady v. Maryland, 373 U.S. 83 (1963), results of medical examinations of two of petitioner's victims. The undisclosed examination reports indicate that no physical evidence of anal or vaginal penetration was found. Petitioner claims "[t]he failure to disclose this evidence is constitutionally significant despite the fact that the charges to which petitioner pled guilty do not require any more than slight penetration" because the failure to disclose "may have affected petitioner's decision" to enter a guilty plea. (Docket 2 at 33.)

The Ninth Circuit held that a habeas petitioner's nolo contendere plea precluded him from challenging alleged constitutional violations that occurred prior to entry of that plea on matters which did not challenge the authority of the state to hale petitioner into court and did not challenge the knowing and voluntary nature of the plea. Ortberg v. Moody, 961 F.2d 135, 137-38 (9th Cir.) (citing Tollett v. Henderson, 411 U.S. 258 (1973)), cert. denied, 113 S.Ct. 225 (1992). Respondent claims that under Ortberg, petitioner cannot raise a Brady claim after entering a guilty plea. (Docket 12 at 16-17.)

Respondent, however, claims that the failure to disclose exculpatory evidence renders petitioner's guilty plea unknowing and involuntary, particularly because in the entry of an Alford plea, evaluation of the evidence is critical. (Docket 14 at 13.) Ortberg and Tollett do not preclude a habeas challenge to the knowing and voluntary nature of a plea. Petitioner must therefore show more than a failure by the prosecution to disclose exculpatory evidence. He is entitled to relief only if the Court finds that petitioner's pleas were not knowing and voluntary because there is a reasonable probability that disclosure of the withheld evidence would have caused petitioner to choose to proceed to trial. See Miller v. Angliker, 848 F.2d 1312, 1320 (2nd Cir.) (a person challenging the validity of a guilty plea who claims that exculpatory information has been withheld from him is entitled to relief only if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different) (citing United States v. Bagley, 473 U.S. 667 (1985)), cert. denied, 488 U.S. 890 (1988).

At the plea hearing, the State outlined the evidence it would present if petitioner went to trial. (Docket 12, ex. 4 at 21-35.) That evidence included testimony by the three minor victims and their mothers. The five witnesses corroborated each others' statements, and most of the sex acts upon which the convictions are based were witnessed by two or more of the children. (Id.) The description of the witnesses' expected testimony is lengthy

and detailed. (See id.) Even accepting petitioner's characterization, the withheld medical reports did not establish the absence of any penetration. They only failed to provide evidence of such penetration. I recommend the Court find there is no reasonable probability that disclosure of the withheld medical reports indicating no physical evidence of anal or vaginal penetration of two victims would have caused petitioner to proceed to trial on all sixteen charges rather than to plead guilty to eleven charges. Accordingly, I recommend the Court grant respondent's motion for summary judgment as to petitioner's claim that the state's withholding evidence of two medical reports rendered his guilty pleas unknowing and involuntary, and that the court deny petitioner's cross-motion for summary judgment or for an evidentiary hearing on this claim.

Ineffective Assistance of Counsel

A habeas petitioner's claim that he was denied effective assistance of counsel requires application of a two-part test. Strickland v. Washington, 466 U.S. 668, 687 (1984).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id.

When considering the first prong of the Strickland test, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the petitioner must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy'." Id.; United States v. Steele, 785 F.2d 743, 750 (9th Cir. 1986).

The second prong of the Strickland test requires a showing of actual prejudice related to counsel's performance. In order to satisfy the "prejudice" requirement in a challenge to guilty pleas based on ineffective assistance of counsel, the defendant must show there is a reasonable probability that were it not for counsel's errors, defendant would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). The Supreme Court stated in Hill that "the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea." Id. at 58 (quoting United States v. Timmreck, 441 U.S. 780, 784 (1979).

> [W]here the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn,

> will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial. Id. at 59

The Court in Strickland stated there is no need for a court to address both components of the inquiry if an insufficient showing is made on one component. Strickland, 466 U.S. at 697. Furthermore, if both components are to be considered, there is no prescribed order in which to address them. Id.

Petitioner claims five grounds for concluding that counsel was constitutionally ineffective:

1. Failure to advise petitioner of the sentencing judge's known practice of imposing the maximum sentence on sex offenders who have not admitted guilt.

2. Inaccurate advice concerning possible legal sentences.

3. Failure to investigate petitioner's mental condition and competence to plead guilty.

4. Failure to investigate the charges.

5. Failure to file pre-trial motions challenging the admissibility of child hearsay.

(Docket 2 at 39-48.)

Failure to Advise: Petitioner claims that counsel's assistance was constitutionally ineffective because counsel did not advise petitioner that the sentencing judge's known practice was to sentence sex offenders to the maximum possible term if they had not admitted guilt. (Id. at 39-42.) At sentencing, the court stated:

> [M]y record with respect to the treatment effects of sex offenders is very consistent. Those that do not admit get the maximum term, because that's the only thing I can do in good conscience because we know, those who deal in this, you, Mr. Rulli, Mr. Peters and myself, all the people that deal in this regularly, all of the experts say without treatment these people will reoffend. So to me it's a very easy decision. No treatment, maximum, that's my responsibility to the community.
>
> . . . Maximum on everything because I can't have Mr. Spencer or any other sex offender back in the community knowing he's going to reoffend, and I always recommend the maximum-minimum in every sex case I have sent up without an admission. . . .
>
> I have also always added a rider to that. If there's treatment within the system and he receives it and completes the treatment, then he should be reconsidered.
>
> . . .
>
> Now, the fact that you're a police officer has nothing to do with my position in this case, because if you go back and check the cases, you'll find out that I'm very consistent in this.

(Docket 12, ex. 4 at 59-61.) Petitioner claims counsel was ineffective because counsel advised petitioner to plead guilty in exchange for dropping five counts, but the maximum sentence would have been the same for the sixteen original counts as for the eleven counts on which petitioner entered guilty pleas. (Docket 2 at 40.)

The record of the plea hearing indicates petitioner was properly advised of the maximum sentences the court could impose before he entered his pleas. (See docket 12, ex. 4 at 16-18, 35.) The court specifically noted that it could go outside the standard sentencing range, either above or below, and that the court does not have to follow any recommendation with respect to the

sentence. (Id. at 17-18.) The court added that even if the prosecutor recommended the minimum within the sentencing range, the court could still sentence petitioner to the maximum. (Id.)

The Ninth Circuit held that an erroneous sentencing prediction by counsel does not invalidate a guilty plea. United States v. Oliveros-Orosco, 942 F.2d 644, 646 (9th Cir. 1991). The Ninth Circuit also held that a district court did not abuse its discretion in denying a motion to withdraw a guilty plea where the defendant was not told that the judge's policy was not to grant probation to anyone guilty of a drug offense in Yosemite National Park. United States v. Johnson, 760 F.2d 1025 (9th Cir. 1985). The court of appeals stated the judge could have varied his policy in a particular case if he were persuaded that he should. Id. at 1026.

Counsel did not give erroneous information concerning sentencing. At most, counsel failed to accurately predict where in the lawful sentencing range the court would decide to sentence petitioner. Johnson and Oliveros-Orosco preclude a finding that counsel's failure to advise petitioner of the sentencing judge's policy on sentencing sex offenders was outside the wide range of reasonable professional assistance. Petitioner's claim of ineffective assistance of counsel based on counsel's failure to accurately predict imposition of the maximum sentences thus fails.

Inaccurate Advice: Petitioner claims he received ineffective assistance of counsel because counsel advised him that if he

entered guilty pleas, he would go to Western State Hospital for treatment. At the sentencing hearing, counsel moved for referral of petitioner to Western State Hospital for evaluation. Counsel stated that the Sexual Offender Statute of the SRA could be interpreted to allow the referral. (Docket 12, ex. 4 at 53.) The court denied the motion, noting that the intent of the legislature was that anyone who receives a term greater than six years is not eligible for treatment. (Id.)

At the plea hearing, the court and the prosecutor advised petitioner that the sentences on counts one and two were twenty years to life imprisonment, and that the upper sentencing range on the other counts was 171 months. The court specifically advised petitioner that the court was required to sentence petitioner to not less than 20 years confinement, and up to life imprisonment. (Docket 12, ex. 4 at 16-18.) Petitioner told the court the plea bargain was not based on any commitments by the prosecutor other than a recommendation that petitioner be sent to the Department of Corrections. (Id. at 15.) After these discussions, petitioner entered guilty pleas. (Id. at 35.)

At sentencing, a discussion of treatment of petitioner at Western State Hospital followed the court's denial of a motion for evaluation there. Counsel for petitioner said:

> [W]hen the offer was made for three counts and being sent to Western State, before my client had an opportunity to accept the offer, the information about these other matters had come up and it was revoked.

(Id. at 58.)

The record indicates, therefore, that although petitioner was originally told treatment was available to him at Western State Hospital, the offer was revoked when additional charges were filed against him. Petitioner stated in open court that he had been promised only that five counts would be dropped and he would be committed to the Department of Corrections if he entered guilty pleas to the other eleven counts. When the court denied referral to Western State, petitioner did not attempt to withdraw his guilty pleas or object that he had been misled. This record indicates no basis for finding that counsel's advice was outside the wide range of reasonable professional assistance.

Failure to Investigate Petitioner's Competence to Plead Guilty: Petitioner claims that counsel was constitutionally ineffective because he did not adequately investigate petitioner's competence to plead guilty and did not advise the court of petitioner's mental health history or that petitioner was taking prescription anti-depressant drugs at the time of the plea hearing. (Docket 2 at 43.)

Counsel, however, arranged to have two psychiatrists examine petitioner prior to the plea hearing. Although the focus of both

psychiatrists was whether petitioner had a mental health defense to the charges, neither psychiatrist indicated a doubt about petitioner's competence to assist in his defense or his ability to understand the charges against him. Counsel and the court discussed petitioner's competence:

> Counsel: Dr. Dixon related to me that my client did not suffer from any mental diseases.
>
> Court: And is competent and able to assist you in his defense?
>
> Counsel: Yes, sir, he's cognizant of the charge against him and to the best of his recollection he's been able to assist me.
>
> Court: Do you agree?
>
> Petitioner: Yes, Sir.

(Id. at 39.)

Dr. Dixon states in his report that he examined petitioner four times. (Docket 2, ex. 10.) Dr. Dixon reported that he "attempted to develop some understanding of [petitioner's] current mental status and his understanding of a variety of charges which had been brought against him . . . . (Id.) Dr. Dixon stated that petitioner "understood most of the allegations" and Dr. Dixon ascertained that [petitioner] did not appear to present evidences of severe disturbance of his mental status . . . . (Id.)

I recommend, therefore, the Court find that, assuming the truth of the facts presented by petitioner, counsel's conduct in investigating petitioner's competence falls within the wide range of reasonable professional assistance.

Failure to Investigate the Charges: Petitioner claims that counsel was constitutionally ineffective because he stated in court that if the case proceeded to trial, he would call no defense witnesses and would present no defense to the charges. (Docket 2 at 43.) Petitioner claims the testimony of the children was subject to impeachment on several bases, and that interviews with the children were subject to rebuttal.

The impeachment and rebuttal suggested by petitioner, however, were not precluded by counsel's statement that he would not call witnesses or present a defense. The impeachment of witnesses and interviewers, rebuttal of reports, etc. would have occurred on cross-examination. Counsel indicated to the court that if the case went to trial, he could only put the State case "to its test." (Docket 12, ex. 4 at 34.) I recommend the Court find that counsel's decision to put the State to its test rather than to pursue an affirmative defense is a decision within the wide range of reasonable professional assistance and a decision that might be considered sound trial strategy.

Failure to File Pre-trial Motions Challenging Admissibility of Child Hearsay: Petitioner claims counsel was constitutionally ineffective because he did not file pre-trial motions challenging the admissibility of child hearsay statements under RCW 9A.44.120 to limit the State's case at trial. (Docket 2 at 46-48.)

If petitioner chose to proceed to trial, the children themselves were expected to testify, thus minimizing or

eliminating the value of determining the admissibility of child hearsay statements. Petitioner stated at the plea hearing that he believed the children were sufficiently competent to testify. (Docket 12, ex. 4 at 22-23.) Counsel told the court he had no doubt that the jury, if presented the evidence the State had, would convict petitioner. (Id. at 21.)

Under these circumstances, there is no reasonable basis upon which to conclude that counsel's decision not to file pre-trial motions to determine the admissibility of child hearsay statements was outside the wide range of reasonable professional assistance. I recommend, therefore, the Court find that, assuming the facts are as presented by petitioner, petitioner fails as a matter of law to establish that counsel's representation was constitutionally ineffective. Accordingly, I recommend the Court grant respondent's motion for summary judgment as to petitioner's claim of ineffective assistance of counsel and that the Court deny petitioner's motion for summary judgment or for an evidentiary hearing on this issue.

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CONCLUSION

For the reasons discussed above, the Court should grant respondent's motion, deny petitioner's motion, and deny the petition. A proposed order accompanies this Report and Recommendation.

DATED this 15 day of November, 1994.

John L. Weinberg
United States Magistrate Judge